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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIBERTY NATIONAL BANK AND TRUST COMPANY,
Petitioner,

v.

STATE OF NORTH DAKOTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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QUESTIONS PRESENTED

1. Whether the court below correctly decided that 12 U.S.C. §29, the provision of the National Bank Act of 1864, 12 U.S.C. §§21 *et seq.*, which establishes the allowable period for national banks to hold real estate acquired in satisfaction of debts previously contracted, does not pre-empt provisions of the North Dakota corporate farming law, N.D. Cent. Code ch. 10-06, which establish a different holding period for national banks in North Dakota with respect to ranchland and farmland acquired in satisfaction of debts previously contracted.

2. Whether this case satisfies the "capable of repetition, yet evading review" standard, and therefore may be accepted by this Court for resolution on the merits.

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STATE OF NORTH DAKOTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

The Petitioner, Liberty National Bank and Trust Company, a national bank chartered under the laws of the United States, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of North Dakota in this case.

OPINIONS BELOW

The opinion of the North Dakota Supreme Court (Appendix at pages 1a-19a) is not yet reported. The opinion of the District Court for the Southwest Judicial District, County of Slope, State of North Dakota (Appendix at pages 20a-26a) is not reported.

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[1] Petitioner has no parent companies, subsidiaries or affiliates which are required to be disclosed pursuant to Rule 28.1.

JURISDICTION

This is a Petition for a Writ of Certiorari to review a final judgment of the Supreme Court of the State of North Dakota upholding the validity of Chapter 10-06, as applied to national banks, against a claim that Chapter 10-06 is pre-empted by 12 U.S.C. §29. The federal question sought to be reviewed here was first raised at the trial level on March 18, 1987, by Petitioner's timely Answer, Appendix at pages 32a-35a to the February 9, 1987, Complaint by the State of North Dakota, Appendix at pp. 28a-31a. In its Answer, Petitioner averred, *inter alia*, that N.D. Cent. Code ch. 10-06: (1) does not apply and was not meant to apply to national banking associations; and (2) is pre-empted and, therefore, inapplicable to Petitioner by virtue of 12 U.S.C. §29. The preemption issue was again raised in Petitioner's motion for summary judgment, and was the specific issue ruled upon by the district court in its judgment in favor of Petitioner on August 17, 1987. Respondent thereafter gave written notice of its appeal to the North Dakota Supreme Court. After full briefing of the federal issue and oral argument, the court ruled that Chapter 10-06 is not preempted by 12 U.S.C. §29.

The judgment of the North Dakota Supreme Court was entered on June 28, 1988. No petition for rehearing was filed. The Mandate of the court was extended, under the provisions of Rule 41(b) of the North Dakota Rules of Appellate Procedure, for a thirty-day period on July 18, 1988, and was again extended on August 16, 1988, under the same authority, until September 26, 1988. The jurisdiction of

this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Supremacy Clause to the United States Constitution, U.S. Const., Art. VI, cl. 2, provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The statute which establishes the time period which national banks may hold real estate obtained in satisfaction of debts previously contracted, 12 U.S.C. §29 provides in pertinent part as follows:

§29. Power to hold real property

A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.

For real estate in the possession of a national banking association upon application by the association, the Comptroller of the Currency may approve the possession of any such real estate by such association for a period longer than five years, but not to exceed an additional five years, if (1) the association has made a good faith attempt to dispose of the real estate within the five-year period; or (2) disposal within the five-year period would be detrimental to the association. Upon notification by the association to the Comptroller of the Currency that such conditions exist that require the expenditure of funds for the development and improvement of such real estate, and subject to such conditions and limitations as the Comptroller of the Currency shall prescribe, the association may expend such funds as are needed to enable such association to recover its total investment.

Notwithstanding the five-year holding limitation of this section or any other provision of this chapter, any national banking association which on the date of enactment of this paragraph held, directly or indirectly, real estate, including any subsurface rights or interests therein, that since December 31, 1979, had not been valued on the books of such association for more than a nominal amount, may continue to

hold such real estate, rights, or interests for such longer period of time as would be permitted a State chartered bank by the law of the State in which the association is located if the aggregate amount of earnings from such real estate, rights, or interests is separately disclosed in the annual financial statements of the association.

3. The Comptroller of the Currency's regulation implementing and interpretating 12 U.S.C. §29, 12 C.F.R. §7.3025 (1988), provides in pertinent part:

§7.3025 Other real estate owned.

(a) "Other real estate owned" is:

(1) Real estate acquired by a national bank:

(i) Through purchases at sales under judgments, decrees, or mortgages where the property was security for debts previously contracted;

(ii) Through conveyance in satisfaction of debts previously contracted; or

(iii) Through purchases to secure debts previously contracted;

* * *

(e) The bank must maintain current documentation reflecting its continuing and diligent efforts to dispose of each parcel of other real estate owned. Other real estate owned must be disposed of within the holding period permitted by 12 U.S.C. 29 at any time that prudent judgment dictates, but in no event later than the end of such holding period. However, if at any time before the end of the holding period the bank can recover the amount of its original loan plus ad-

ditional advances and other costs related to the loan or the parcel of other real estate owned, it should promptly dispose of the parcel. The holding period of 12 U.S.C. 29 begins on the date that legal title to the property is transferred to the bank, except for real estate for which banking use is no longer contemplated and property sold in a covered transaction. . . .

* * *

(h) The bank must obtain annually from an independent, qualified appraiser a current appraisal of fair value for each parcel of other real estate owned or certification, in letter form, that the fair value has not declined. . . .

4. The North Dakota corporate farming law, N.D. Cent. Code Ch. 10-06, provides in pertinent part:

10-06-01. Farming or ranching by corporations prohibited . . . .

All corporations, except as otherwise provided in this chapter, are prohibited from owning or leasing land used for farming or ranching and from engaging in the business of farming or ranching.

10-06-13. Enforcement—Penalty.

* * *

4. Subject to the divestiture requirements of subsections 5, 6, and 7, a domestic or foreign corporation may acquire farmland or ranchland as security for indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise.

5. Unless retention of the farmland or ranchland is permitted under subsection 6 or 7, all farmland or ranchland acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter.

6. The disposition requirement does not apply to a corporation that has acquired title to the land through the process of foreclosure of a mortgage, or a deed from a mortgagor, or a deed from a mortgagor instead of a foreclosure, if, by the expiration of one month after what is or what would have been if the mortgage had been foreclosed the redemption period of the mortgage, that corporation leases to the prior mortgagor from who it was acquired, with an option to purchase, and if documents evidencing the lease agreement have been filed with the register of deeds of each county in which the land is located. A copy of a notice of lease is sufficient evidence. The exemption in this subsection applies for only five years and then only if the property has been appraised in accordance with subsection 8. The annual lease payments required of the tenant cannot exceed seven percent of the appraised value.

7. The disposition requirement does not apply to a corporation that has acquired title to the land through the process of foreclosure of a mortgage, or a deed from the mortgage, or a deed from the mortgagor instead of foreclosure, if, by the expiration of one month after what is or what would have been if the mortgage had been foreclosed the redemption period of the mortgage, that corporation contracts for the

sale of the land to the prior mortgagor from whom it was acquired. . . .

STATEMENT

Petitioner is a national banking association which received its federal charter in 1916 pursuant to the provisions of the National Bank Act of 1864, 12 U.S.C. §§21 *et seq.* As such, it is subject to examination and regulation by the Office of the Comptroller of the Currency, a bureau of the United States Department of the Treasury, *see* 12 U.S.C. §§1 *et seq.* This case concerns the relationship between 12 U.S.C. §29, the federal statute which establishes the allowable holding period for a national bank holding real estate acquired in satisfaction of debts previously contracted and the Comptroller's regulation which implements Section 29, and the North Dakota corporate farming statute, N.D. Cent. Code, ch. 10-06, which establishes a holding period for corporations, including national banks, holding farmland or ranchland in North Dakota acquired in satisfaction of indebtedness different than that provided in Section 29.

Section 29 authorizes a national bank to hold real estate acquired in foreclosure for a five-year period. Upon application to the Comptroller, the original five-year period may be extended for up to an additional five years if (1) the association has made a good faith effort to dispose of the real estate, and (2) disposal of the real estate within the original five year period would be detrimental to the association. The Comptroller's regulation relating to such real estate, 12 C.F.R. §7.3025, requires a national bank to dispose of its real estate within the holding period permitted by Section 29 "at any time prudent judgment dic-

tates," i.e. when the bank can recover the amount of its original loan plus additional advances and other costs related to the loan, and, in any event, not later than the end of the holding period. The corporate farming law, Chapter 10-06, provides a three-year holding period for corporations doing business in North Dakota to hold ranchland and farmland acquired in foreclosure. This three-year period may be extended for an additional five-year period if lender leases the real estate to the prior mortgagor with an option to purchase the property, and does not apply altogether where the lender contracts for the sale of the land to the prior mortgagor. The decision below holds that the North Dakota statute, not the federal statute, is applicable to national banks operating in North Dakota.

The facts giving rise to the litigation may be summarized briefly. A borrowing customer of Petitioner defaulted on a $150,000 loan secured in part by a real estate mortgage covering 320 acres of farmland located in Slope County, North Dakota. In order to avoid foreclosure of the mortgage, the customer conveyed the 320 acres to Petitioner by warranty deed dated September 19, 1983. The agreed value of the land, approximately $107,000, was credited upon the loan's indebtedness. Petitioner leased the property to customer with an option to purchase from 1983 to 1986, until the customer notified the bank that he was no longer in a position to attempt to purchase the land, and that he had quit farming and had no further desire or intention to purchase or lease the property. Petitioner thereafter leased the farmland to maintain it as an efficient operating farm unit and

attempted to locate purchasers by seeking private bids and listing the property with a realtor.

Petitioner, however, received no offers within the three-year holding period provided by Chapter 10-06 other than offers which would cause it to suffer a substantial loss on the property. Petitioner attributes its inability to dispose of the property to the depressed economic conditions existing in western North Dakota, particularly in the area of farming. The highest bid for the property received by Petitioner during that period was $64,000, which was substantially below the appraised value of the property. In 1987, nearly four years after it foreclosed on the real estate, Petitioner sold the property at a price which, though a loss, gave Petitioner a better return on its investment than it would have gotten had it been forced to sell the property in the previous year.

Respondent initiated this action pursuant to Chapter 10-06 to force Petitioner to divest the real estate it had held for more than the three-year holding period. In its complaint and its request for summary judgment in the District Court for Slope County, Respondent averred that Petitioner is a corporation within the meaning of Chapter 10-06, that Petitioner was in violation of Chapter 10-06, that no exception contained therein was applicable to Petitioner, and that Chapter 10-06 was meant to apply to national banking associations. Respondent requested the court to order Petitioner to divest the real estate and, if Petitioner failed to obey such order, to order the North Dakota Secretary of State to dissolve Petitioner or to order Petitioner to cease doing business in North Dakota.

In its answer and its return and motion for summary judgment, Petitioner argued that Chapter 10-06 does not apply and was not meant to apply to national banking associations and that Chapter 10-06 is pre-empted and inapplicable to Petitioner by virtue of Section 29. On August 17, 1987, the district court granted Petitioner's motion for summary judgment, relying on this Court's decision in *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141 (1982). The court stated:

> There does indeed exist in the case at bar a fundamental conflict between Chapter 10-06 of the North Dakota Century Code and 12 U.S.C. §29. [In *Fidelity Federal v. De La Cuesta*] the United States Supreme Court recognized that the relative importance to the State of its own law is not material when there is a conflict with a valid Federal law. The United States Government by granting to banks with national charters the opportunity to dispose of real property acquired in the ordinary course of their business, has expressly granted to such national banks flexibility within their internal operations and accordingly to suggest that an reduction of that period of time by state statute is not a conflict, is without merit. Appendix at pp. 24a-25a.

On appeal, the North Dakota Supreme Court reversed. At the outset, the court noted that, although Petitioner had sold the land involved in the lawsuit after the court had heard oral argument, the court would not dismiss the appeal as moot since the matter was of great public interest involving the authority

of public officials and was "capable of repetition, yet evading review." Appendix at p. 3a.

The court then concluded that there is no actual conflict between Section 29 and Chapter 10-06, because, in the court's view, the state law does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting Section 29. Rather, the court found that "the primary purpose of each law is the same, *i.e.* preventing banks and corporations from becoming monopolistic holders of real estate," and noted a "similar congruity" in the secondary purpose of each statute, *i.e.*, providing "a measure of protection to banks and corporations through the respective legislative bodies' reasonable choices of appropriate divestiture periods." Appendix at p. 16a.

The court also found that chapter 10-06 does not frustrate Congress' objectives in authorizing the Comptroller to extend the initial five-year holding period in Section 29, since the North Dakota legislature, like Congress, had eased the three-year limitations by allowing exemptions. The court stated that "[w]hile the exemptions under state law are more narrowly drawn than those allowed by §29, the [North Dakota] Legislature could reasonably determine that the exemptions will provide adequate protection for the banks . . . ." Appendix at p. 17a.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the preemption of state laws by the National Bank

Act and the appropriate role of the Comptroller of the Currency in the administration of that Act. The North Dakota Supreme Court has held that provisions of the National Bank Act governing real estate holding periods applicable to national banks do not preempt provisions of North Dakota law which establish different and conflicting holding period requirements for national banks operating in North Dakota. As a result, the Court has nullified 12 U.S.C. §29 in an attempt to further the purposes and objectives of the North Dakota statute.

The ruling below seriously misconstrues this Court's preemption decisions, particularly the decision in *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141 (1982). In nullifying the federal statute, the court focused on the arguable similarity of one common purpose of the two statutes, while completely ignoring the means which Congress furnished to effectuate the purposes of Section 29, and the plenary authority of the Comptroller to administer Section 29. By doing so, the court endorsed a patent conflict between the state and federal law. In light of the vulnerability of national banks nationwide, by virtue of the decision below, to corporate farming and other state laws which directly conflict with the National Bank Act, and in light of the resulting threat to the dual banking system established by Congress, a review by this Court of the decision below is essential.

1. THE PRE-EMPTION DOCTRINE.

It is well established by decisions of this Court that state law is preempted to the extent that it actually conflicts with federal law. As the Court stated in *Fidelity Federal Savings and Loan Association v. De*

La Cuesta, 458 U.S. 141, 153 (1982), "[s]uch a conflict arises when compliance with both federal when state regulations is a physical impossibility . . . or the state law in question stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . ." *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (physical impossibility); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (purposes and objectives of Congress); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). Nor is a direct conflict permitted "simply because real property law is a matter of special concern to the states: the relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. at 153 (quoting, *Free v. Bland*, 369 U.S. 363, 366 (1962)).

With respect to laws applicable to national banks specifically,

> "state law which attempts to define their duties or control the conduct of their affairs are void whenever such attempt and exercise of authority conflicts with the laws of the United States and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge their duties, for the performance of which they were created.

Davis v. Elmira Savings Bank, 161 U.S. 275 (1895); *see Easton v. Iowa*, 188 U.S. 220 (1903); *First National Bank of San Jose v. California*, 262 U.S. 366

(1923); *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954).

2. THE NATIONAL BANK ACT OF 1864 PRE-EMPTS NORTH DAKOTA LAW

A. N.D. CENT. CODE, CHAPTER 10-06 STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS IN ENACTING SECTION 29.

The purposes and objectives of Congress in enacting Section 29, as amended, were to (1) prevent national banks from gaining a monopoly on real estate, (2) keep bank capital in relatively liquid form and prevent national bank speculation in real estate, *see National Bank v. Matthews*, 98 U.S. 621, 626 (1878), and (3) provide a mechanism for the orderly and timely disposition of real estate held in foreclosure without loss by national banks. Congress' chosen means of effectuating these policies and objectives are the imposition of the initial five-year holding period, as monitored and administered by the Comptroller through its general examination and regulatory authority, and the grant of authority to the Comptroller to approve extensions of the five-year period and to set such conditions and limitations on the use of bank funds to further improve the property to enable the bank to save its investment.

Section 29 was enacted as part of the National Bank Act of 1864, Act of June 3, 1864, Ch. 106, §44, 13 Stat. 112 (Rev. Stat. §5137). As the court below correctly states, Appendix at pp. 9a-10a, Congress after careful deliberation established the five-year holding period as an appropriate period to effectuate the dual policies of (1) preventing a monopoly on land holdings by national banks, and (2) providing national banks with sufficient time to "make every prudent

and proper arrangement" for the disposal of real estate acquired in satisfaction of their debts. Cong. Globe, 38th Cong., 1st Sess., 1352, 2019-2020 (1864). (Statement of Sen. Davis).

The two most recent amendments to Section 29 significantly increased the flexibility of national banks to dispose of real property in a manner which would prevent loss. Section 401(a) of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980), amended Section 29 to give the Comptroller authority to extend the initial five-year period upon a showing that the bank seeking the extension had made a good faith effort to dispose of the real estate within five years or that disposal of the real estate within the five-year period would be detrimental to the bank. In addition, Section 401(a) provided that a bank may expend funds for the development and improvement of real estate, subject to such conditions and limitations as the Comptroller shall prescribe, if such expenditures are needed to enable the bank to recover its total investment. In his support and explanation of the amendment, Comptroller Heimann stated that:

> With the development of modern banking [the five-year holding period in Section 29] . . . often results in unnecessary hardship. It does not take into account depressed economic conditions which might prevent disposal of real estate at prices reflecting the bank's investment, and it also adversely conditions the market, since prospective purchasers are aware that the sale is compulsary. National banks are thus prevented from mitigating or avoiding their losses, . . .

125 Cong. Rec. 14,599 (June 13, 1979) (letter from John G. Heimann, Comptroller of the Currency, to Honorable William Proxmire, Chairman, Committee on Banking, Housing and Urban Affairs, United States Senate, dated May 31, 1979.) Comptroller Heimann further supported the amendment to Section 29 because it provided needed flexibility to the Comptroller's Office to handle exceptional circumstances. *Id.*

Section 413 of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1521, Title IV, §413 (October 15, 1982) also gave national banks additional flexibility by providing that a national bank may hold certain real estate for the same period that a state-chartered bank could hold such real estate by virtue of the law of the state in which the national bank is located. Thus, the legislative history of Section 29 displays Congress' desire to provide flexibility for national banks to faciliate their disposal of real estate holdings in a safe and sound manner without loss, and to give the Comptroller specific statutory oversight authority to supplement its general authority already provided under the National Bank Act.

The Comptroller's regulation implementing Section 29, 12 C.F.R. §7.3025, which was published for public comment twice before being released, effectuates the policies of Section 29. In the preamble to Section 7.3025, the Comptroller stated that the five-year holding period provided by Section 29 is "a maximum figure only, and that earlier sale is required if the bank can recover its full investment in the property . . . [t]his reflects the policy of 12 U.S.C. 29 that banks should not speculate in real estate." 44 Fed.

Reg. 46429, 46431 (August 8, 1979). Moreover, the Comptroller stated, such divestiture should occur even if "management feels the property has potential for further appreciation . . . ." *Id.* The regulation requires a national bank to dispose of "other real estate owned" within the holding period established by Section 29 at any time that prudent judgment dictates," i.e., whenever the bank can recover the amount of its original loan plus additional advances and costs. 12 C.F.R. §7.3025(e). Thus, the regulation reflects and implements Congress' policies of requiring national banks to diligently seek to dispose of other real estate owned while providing national banks with the necessary flexibility in situations where disposal of such real estate would result in loss to the bank.

In *Fidelity*, 458 U.S. 141, the Court reversed the decision of the Court of Appeals for the Ninth Circuit in denying the preemptive effect of regulations of the Federal Home Loan Bank Board, which permitted, but did not compel, federal savings and loan associations to use "due-on-sale" clauses in their mortgage contracts. Due-on-sale clauses generally provide that a mortgage lender may declare a loan fully due and payable upon a sale or other transfer of the property which is collateral for the loan. California law prohibited lenders, including federal savings and loan associations, from exercising due-on-sale clauses unless the lender could demonstrate that the transfer which triggered the due-on-sale clauses had impaired the lender's security. See, *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 582 P.2d 970 (1978). The Court specifically overruled the court of appeal's conclusion that, because the purposes of both California and federal law were similar, i.e., "to assist federally dis-

tressed homeowners," 458 U.S. at 150, the California law did not stand as an obstacle to the purposes of the federal law. *See* 458 U.S. at 154-156.

Similarly, the court below decided erroneously that Chapter 10-06 did not stand as an obstacle to the purposes and objectives of Congress as embodied in Section 29, since the purposes of Chapter 10-06 were to "protect [the corporation's] legitimate business interests while preventing the accumulation of farmland and ranchland by such corporations," and thus were "identical" to the purposes of Section 29. Appendix at p. 14a. As this Court held in *Fidelity*, the similarity of the purposes of the federal and state law does not preclude pre-emption where the state law actually conflicts with the federal law. The state law here, though similar in purpose, "interferes with the methods by which the federal statute was designed to reach [its] . . . goal." *International Paper Co. v. Ouellette*, 479 U.S. ___, 93 L. Ed. 2d 883, 898 (1987); *Michigan Canners & Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 477 (1984).

Absent the operation of certain narrow exceptions which were not available to Petitioner in this case, Chapter 10-06 infringes a national bank's right to hold foreclosed real estate for the period authorized by Section 29. The conflict "does not evaporate" because Section 29 permits, but does not compel, national banks to hold foreclosed real estate for five, and, possibly, up to ten years. 458 U.S. at 155. The North Dakota legislature, and the court below, require national banks to divest real estate within three years,

and have thus deprived national banks of the flexibility provided in Section 29 and the Comptroller's regulation. Chapter 10-06, as applicable to national banks must therefore be pre-empted.

Moreover, although one of the purposes of Chapter 10-06, preventing the accumulation of the State's real estate in the hands of corporations, is arguably similar to a purpose and objective of Section 29, preventing the accumulation of large portions of real estate in the hands of national banks, the purposes and objectives of Chapter 10-06 are certainly not "identical" to those of Section 29, as the court below has stated. Section 29 and the Comptroller's regulation also aim at ensuring that the safety and soundness of the national bank system is not impaired by risky speculation by banks in real estate or by the tying up of a bank's capital in non-liquid investments, and at ensuring that national banks may dispose of real estate in a timely and orderly fashion without loss. The North Dakota legislation does not seek to effectuate these additional purposes aimed as they are at the preservation of the national banking system, which is solely the concern of the Comptroller. Rather, as noted in the court below, an important purpose of Chapter 10-106 is to keep ranchland and farmland in the hands of the original ranchers and farmers through the promotion of incentives for banks and other lenders to work out repayment arrangements with borrowers. See Appendix at pp. 14a-15a. As is demonstrated is Petitioner's case, the effectuation of this policy can work hardship and loss on a national bank and thereby frustrate the objectives of Congress.

In this respect, Petitioner was unable to lease or resell its foreclosed property to the original borrower

and, therefore, could not partake of the time extensions provided in Chapter 10-06. Petitioner was thus required to divest the property after the three-year period regardless of the current conditions in the real estate market or whether the sale would result in a loss. By limiting the availability of the five-year period and extension procedure provided by federal law to afford its national banks sufficient "work-out" time to dispose of its foreclosure property, the operation of Chapter 10-06 creates "an obstacle to the accomplishment and execution" of Section 29. *Hines v. Davidowitz* 312 U.S. at 67.

B. FEDERAL LAW HAS OCCUPIED THE FIELD OF REGULATION OF NATIONAL BANK HOLDING OF REAL ESTATE.

Absent express preemptive language in a federal statute "Congress' intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for the States to supplant it." *Hillsborough County v. Automated Medical Labs,* 471 U.S. 707, 713 (1985); *see Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cable Cities v. Crisp*, 467 U.S. 691 (1984). In this respect, the National Bank Act has long been regarded by this Court as "a comprehensive code creating and regulating the national banks of the United States, constituting by itself a complete system for the establishment and government of national banks." *Cook County National Bank v. United States*, 107 U.S. 445 (1883); See *Davis v. Elmira Savings Bank*, 161 U.S. 238 (1896); *Easton v. Iowa*, 188 U.S. 238 (1903); *Farmer's & Mechanics National*

Bank v. Dearing, 91 U.S. 29 (1885). While it is also true that national banks are subject to state law generally applicable to all persons and businesses, *see McClellan v. Chipman*, 164 U.S. 347 (1896) (state fraudulent conveyance statute); *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944) (state escheat law); *Huntington Towers, Ltd. v. Franklin National Bank*, 559 F.2d 863 (2d Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978) (statute of frauds), States lack the power to regulate national banks in areas specifically covered by the National Bank Act or regulations issued thereunder. *See Farmers & Mechanics National Bank v. Dearing, supra*; *Yonkers v. Downey*, 309 U.S. 590 (1940); *Davis v. Elmira Savings Bank, supra*; *Conference of State Bank Supervisors v. Conover*, 710 F.2d 858 (D.C. Cir 1983).

Congress in Section 29 provides a comprehensive system for the holding of real estate by national banks. Section 29 *prohibits* national banks from purchasing, holding and conveying real estate except in four narrow circumstances. As discussed *supra*, at p. 15-16, after some debate, Congress established five years as an appropriate period within which to dispose of real estate held by national banks. Congress further provided that this five years could be supplemented, if need be, with an additional five-year period. In this respect, Congress granted to the Comptroller general authority to administer the national banking laws, including Section 29, as well as specific statutory discretion to approve extensions of the original five-year period and the expenditure of by national banks of additional funds to recover their investment. It is well established that state law cannot displace the Comptroller's exercise of discretion granted under

the National Bank Act. *Conference of State Bank Supervisors* v. *Conover*, *supra*.

The federal statute and regulations thereunder thus constitute a comprehensive framework for the ultimate disposition of the four narrow categories of real estate which national banks may hold. There is no room thereunder for state law to operate.

2. THIS COURT HAS JURISDICTION TO DECIDE THIS CASE SINCE THE UNDERLYING DISPUTE IS ONE "CAPABLE OF REPETITION, YET EVADING REVIEW".

This Court has jurisdiction to review the decision below, despite the fact that Petitioner has sold the parcel of real estate which was the subject of Respondent's complaint, since the underlying dispute is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *see Murphy v. Hunt*, 455 U.S. 486 (1982); *Nebraska Press Association v. Stuart*, 427 U.S. 548 (1976); *Weinstein v. Bradford*, 423 U.S. 347 (1975). The court below reached the same conclusion when it decided to retain jurisdiction. *See* Appendix at p. 3a.

The controversy is capable of repetition since there exists a reasonable expectation that the "same complaining party" will be "subject to the same action again." *Weinstein*, 423 U.S. at 349. The North Dakota Supreme Court's decision authorizes Respondent to enforce the three year divestiture requirement in cases involving national banks. An identical dispute between Respondent and a national bank in North Dakota,

perhaps even Petitioner, is therefore likely to occur, particularly in light of the decision below.

Further, if the Court does not decide the issues presented in this case the dispute will evade review since the challenged action, the holding by a national bank of real estate acquired in foreclosure, is by its nature an activity which is designed to be short-lived. The Comptroller's regulations impose on national banks an affirmative duty to diligently seek to dispose of such property. Moreover, such real estate represents a non-performing or under-performing asset on the bank's books and is therefore undesirable for the bank to hold, particularly in a depressed economic region or a slow real estate market where the bank stands to realize minimal or no appreciation on the property.

Thus, although the Comptroller's regulation allows, but does not require, national banks to hold real estate until it can be sold without loss, a bank's "best price" for a parcel of real estate in a depressed region or a slow market may well involve a loss to the bank upon its sale of the parcel. The decision to sell and achieve this price is a business decision of the bank's management which must be made and acted upon independently of any desire to preserve jurisdiction in litigation of this type.

Moreover, assuming that a bank does not or cannot receive an extension of the five-year divestiture period provided by Section 29, the two extra years provided are not sufficient to fully litigate an action brought by Respondent to enforce the three-year holding period in Chapter 10-06.

CONCLUSION

The Petition for a Writ of Certiorari should, therefore be granted.

Respectfully submitted,

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September 26, 1988

APPENDIX

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellant

v.

Liberty National Bank and Trust Company, a North Dakota Corporation, Defendant and Appellee

Civil No. 870256

Filed June 28,1988

Appeal from the District Court of Slope County, Southwest Judicial District, the Honorable Donald L. Jorgensen, Judge.

REVERSED.

Opinion of the Court by Levine, Justice.

Allen C. Hoberg (argued), Assistant Attorney General, Attorney General's Office, State Capitol, Bismarck, ND 58505, for plaintiff and appellant. Appearance by Nicholas J. Spaeth.

Mackoff, Kellogg, Kirby & Kloster, P.C., P.O. Box 1097, Dickinson, ND 58602-1097, for defendant and appellee; argued by Gordon W. Schnell. Appearance by Mary E. Maichel.

Keith C. Magnusson (argued), P.O. Box 1438, Bismarck, ND 58502, for amicus curiae N.D. Bankers Association.

State v. Liberty National Bank and Trust Company

Civil No. 870256

LEVINE, Justice.

The State appeals from a district court summary judgment dismissing its divestiture action against Liberty National Bank and Trust Company [Liberty National] on the ground that the three-year limitation for holding farmland under § 10-06-13(5), N.D.C.C., of the corporate farming laws is not applicable to Liberty National because the state provision is pre-empted by 12 U.S.C. § 29 of the National Bank Act. We reverse.

The facts are not disputed. Liberty National is a national bank chartered by and subject to the supervision of the Comptroller of the Currency pursuant to the National Bank Act of 1864, 12 U.S.C. § 21 *et seq.* Marvin D. Lutz defaulted on a $150,000 loan from Liberty National which was secured in part by a real estate mortgage covering 320 acres of farmland in Slope County. In order to avoid foreclosure of the mortgage, Lutz conveyed the 320 acres to the Bank by warranty deed dated September 19, 1983. The agreed value of the land, approximately $107,000, was credited upon the loan indebtedness. The Bank leased the land to Lutz with an option to purchase from 1983 to 1986, but in the fall of 1986 Lutz told the Bank he had quit farming and would not buy or lease the land. According to the Bank, it has attempted to locate purchasers by seeking private bids and listing the property with a realtor, but has not received any offers "for an amount which would prevent the Bank from suffering a substantial loss on its investment."

The State brought this action against Liberty National in February 1987 pursuant to § 10-06-13, N.D.C.C., to force the Bank to divest itself of the farmland because it had held the land for more than three years and none of the statutory exceptions for holding the land for a longer

period applied. The Bank admitted that none of the statutory exceptions applied, but claimed in its answer that the three-year holding period in § 10-06-13, N.D.C.C., was pre-empted by the five-year holding period in 12 U.S.C. § 29. The district court agreed with Liberty National and granted summary judgment dismissing the action. The State appealed.

After oral argument in this court, we were informed by counsel that Liberty National has sold the land involved in this lawsuit. We will not dismiss an appeal as moot where the matter in controversy is one of great public interest and involves the authority and power of public officials, or where the matter is " 'capable of repetition, yet evading review.' " *Matter of Prettyman*, 410 N.W.2d 533, 536 (N.D. 1987) [quoting *Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169, 170 (N.D. 1986) quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546, 96 S.Ct. 2791, 2797, 49 L.Ed.2d 683 (1976)].[1] The issue presented in this case is a question of great public interest and will have important consequences in the State's future enforcement of the corporate farming laws. Moreover, considering a bank's continuing obligation to attempt to divest itself of foreclosed property and the length of time required for a case to work its way through the trial and

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[1] Although *Matter of Prettyman*, 410 N.W.2d 533, 536 (N.D. 1987), might indicate that the factors of "great public interest," "authority and power of public officials," and "capable of repetition, yet evading review" must each be established before we will deem an appeal not moot, these factors are components of two separate tests for determining whether we will treat a case as moot. Whether the matter in controversy is one of great public interest *and* involves the authority and power of public officials is the test this court has historically employed in resolving mootness issues. *See North Dakota Wheat Growers' Ass'n v. Moore*, 52 N.D. 904, 204 N.W. 834 Syllabus 2 (1925); *State v. Stutsman*, 24 N.D. 68, 139 N.W. 83 Syllabus 1 (1912). We adopted as an alternate test the United States Supreme Court's doctrine of "capable of repetition, yet evading review" in *Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169, 170 (N.D. 1986).

appellate court processes, we believe that this issue is capable of repetition, yet evading review. We therefore conclude that the issue in this case is not moot and proceed to the merits.

PRE-EMPTION PRINCIPLES

National banks were brought into existence under federal legislation, are instrumentalities of the federal government, and are necessarily subject to the paramount authority of the United States. *First National Bank v. Missouri*, 263 U.S. 640, 656, 44 S.Ct. 213, 215, 68 L.Ed. 486 (1924). As such, Congress has the authority to determine the extent to which state law is pre-empted with respect to a national bank's activities. *See Federal Land Bank of St. Paul v. Lillehaugen*, 404 N.W.2d 452, 455 (N.D. 1987).

The standards for deciding a pre-emption question are well established. Essentially, federal pre-emption of state law can occur in one of three ways. First, Congress may explicitly define the extent to which it intends to pre-empt state law. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96, 103 S.Ct. 2890, 2898-2900, 77 L.Ed.2d 490 (1983). Express pre-emption of state law occurs when Congress specifically declares in a federal statute that it intends to pre-empt state law in a particular field. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 106 S.Ct. 1103, 89 L.Ed.2d 364 (1986); *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983).

Second, even when there is no express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation and thereby impliedly pre-empt state law. *See City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). Implied, or occupation of the field pre-emption can be inferred "where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal

interest in the field is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose.' " *Schneidewind v. ANR Pipeline Co.*, ___U.S. ___, ___, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316 (1988) [quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)]. *See also Pacific Gas & Electric Company v. St. Energy Resources Conserv.*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

Third, even when Congress has not intended to entirely displace state law in a particular area, state law is pre-empted to the extent that it "actually conflicts" with federal law. *Michigan Canners & Freezers v. Agricultural Bd.*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984). Conflict pre-emption occurs where compliance with both federal and state laws is a physical impossibility, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). *See also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984); *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 103 S.Ct. 2467, 76 L.Ed.2d 678 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978).

Courts are reluctant to infer pre-emption, *Federal Land Bank of St. Paul v. Lillehaugen, supra*, and it is the burden of the party claiming Congress intended to pre-empt state law to prove it. *Perdue v. Crocker Nat'l Bank*, 38 Cal.3d 913, 216 Cal.Rptr. 345, 702 P.2d 503, 520 (1985), *appeal dismissed*, 475 U.S. 1001, 106 S.Ct. 1170, 89 L.Ed.2d 290 (1986). We also recognize that the pre-emption doctrine is "not inapplicable . . . simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is not material

when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) [quoting *Free v. Bland,* 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962)]. In the final analysis, "the question whether federal law in fact preempts state action in any given case necessarily remains largely a matter of statutory construction." L. Tribe, *American Constitutional Law* § 6-25, at p. 480 (2d ed. 1988). *See also Schneidewind v. ANR Pipeline Co., supra* ["A pre-emption question requires an examination of congressional intent."]

Liberty National does not contend that Congress has expressly pre-empted state holding periods for real estate. Nor does it contend that Congress, through enactment of the National Bank Act, has impliedly pre-empted the entire field of regulation over national banks. *See First National Bank v. Missouri, supra* ["[N]ational banks are subject to the laws of a State in respect to their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."]; *McClellan v. Chipman,* 164 U.S. 347, 356-357, 17 S.Ct. 85, 87, 41 L.Ed. 461 (1896); *Biby v. Union National Bank of Minot,* 162 N.W.2d 370, 375 (N.D. 1968). Rather, the Bank asserts that the state holding period for real estate is pre-empted by the federal law because an actual conflict exists. The Bank does not contend that the conflict exists because compliance with both the state and federal laws is a physical impossibility, but because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

12 U.S.C. § 29

12 U.S.C. § 29 currently provides:

"§ *29. Power to hold real property*

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.

"For real estate in the possession of a national banking association upon application by the association, the Comptroller of the Currency may approve the possession of any such real estate by such association for a period longer than five years, but not to exceed an additional five years, if (1) the association has made a good faith attempt to dispose of the real estate within the five-year period, or (2) disposal within the five-year period would be detrimental to the association. Upon notification by the association to the Comptroller of the Currency that such conditions exist that require the expenditure of funds for the development and improvement of such real

> estate, and subject to such conditions and limitations as the Comptroller of the Currency shall prescribe, the association may expend such funds as are needed to enable such association to recover its total investment.
>
> "Notwithstanding the five-year holding limitation of this section or any other provision of this chapter, any national banking association which on the date of enactment of this paragraph held, directly or indirectly, real estate, including any subsurface rights or interests therein, that since December 31, 1979, had not been valued on the books of such association for more than a nominal amount, may continue to hold such real estate, rights, or interests for such longer period of time as would be permitted a State chartered bank by the law of the State in which the association is located if the aggregate amount of earnings from such real estate, rights, or interests is separately disclosed in the annual financial statements of the association."

When originally enacted in 1864 as part of the National Bank Act, § 29 did not provide for any exceptions to the five-year holding limitation for possession of real estate purchased to secure debts. The Supreme Court has stated that the primary objective of the restrictions placed upon national banks "was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real-estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain." *National Bank v. Matthews*, 98 U.S. 621, 626, 25 L.Ed. 188 (1878); *see also First Nat'l Bank of Bellaire v. Comp. of Currency*, 697 F.2d 674, 681 (5th Cir. 1983). It has also been said that the restrictions were "designed to protect bank depositors and stockholders from risky investments." *Central Nat'l Bank v. Fleet-*

wood Realty Corp., 110 Ill.App.3d 169, 441 N.E.2d 1244, 1250-1251 (1982); *see also Exchange Bank of Commerce v. Meadors*, 199 Okl. 10, 184 P.2d 458, 463 (1947). The legislative history reveals that although the primary purpose of the original five-year limitation was undoubtedly to prevent national banks from becoming extensive and monopolistic holders of real estate, Congress also considered the adverse consequences of forced divestitures on the banks.

As originally proposed, the National Bank Act contained no time limitation on the holding of real estate. The House of Representatives sought to remedy this lack of a limitation period by an amendment requiring real estate not necessary for the bank's business "to be offered for sale at public auction at the door of the banking house of such association within six months after acquiring the title to the same. . . ." Cong. Globe, 38th Cong., 1st Sess. at 1352 (1864) (statement of Rep. Holman). This amendment was withdrawn by its sponsor after an opponent termed it "vicious and injudicious" and stated that "[i]f there be such a depression as there was in 1837 and 1857, and it should continue for two or three years, this provision would compel the banks to sell the land which they might hold instead of letting them hold it to a future time when it may be disposed of to advantage." Cong. Globe, *supra* (statement of Rep. Stevens).

The five-year limitation period was subsequently offered as an amendment in the Senate. *See* Cong. Globe, 38th Cong., 1st Sess. at 2019-2020 (1864). This amendment was also attacked because it would allegedly "operate very injuriously and be hard on the banks" and would "restrain them or compel them to sell unreasonably or may even impose on them an impossible condition." Cong. Globe, *supra,* at 2020 (statement of Sen. Sherman). The amendment was agreed to, however, after its sponsor stated:

> "It seems to me that it would be impolitic and might turn out to be mischievous to allow a bank

> thus indefinitely to acquire and indefinitely to hold the title and possession of real estate. I think it is a monopoly in the acquisition of real estate that ought not to be allowed to a bank. The time of five years which I have fixed within which to compel it to part with the title and possession of real estate that it may purchase in satisfaction of its debts, may be too short, but I should think it would be ample. If that time is too short, let a further extension within a reasonable period be proposed. It seems to me that five years is ample time to enable a bank to make every prudent and proper arrangement in the disposition of any real estate it may purchase in satisfaction of its debts." Cong. Globe, *supra* (statement of Sen. Davis).

Thus, Congress' choice of the five-year limitation period reflects its reasoned judgment in tempering the adverse consequences arising from its primary goal of preventing banks from becoming monopolistic holders of real estate.

Although the benefit of providing an extension of the five-year limitation was first recognized in the debates concerning the 1864 legislation, it was not until 1980 that Congress amended § 29 to allow an extension under certain circumstances. The current provision, allowing the Comptroller of the Currency to extend the holding period to a maximum of ten years if a good faith attempt is made to dispose of the property within the five-year period or if it appears that disposal would be detrimental to the bank, was introduced at the request of the Comptroller as one of several "noncontroversial," "housekeeping" amendments to the national banking laws which became part of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 701(a), 94 Stat. 132, 186 (1981). *See* S. Rep. No. 96-368, 96th Cong., 2d Sess. 13, *reprinted in* 2 1980 U.S. Code Cong. & Ad. News 236, 249; 125 Cong. Rec. 14,597 (1979). In seeking

the amendment, the Comptroller expressed concern that the five-year limitation period "does not take into account depressed economic conditions which might prevent disposal of real estate at prices reflecting the bank's investment. . . ." 125 Cong. Rec. 14,599 (1979) (letter from John G. Heimann, Comptroller of the Currency, to William Proxmire, Chairman, Committee on Banking, Housing and Urban Affairs, U.S. Senate, dated May 31, 1979).

The most recent amendment to § 29 came two years later when Congress enacted the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 413, 96 Stat. 1469, 1521-1522 (1984). This amendment permits certain national banks holding real estate which has been nominally valued in their books since December 31, 1979, to continue to hold this real estate for such further period of time as permitted by the law applicable to state chartered banks in the state in which the owning bank is located. *See* Sen. Rep. No. 97-536, 97th Cong. 2d Sess. 33, 62, *reprinted in* 3 1982 U.S. Code Cong. & Ad. News 3087, 3116. The legislative history on this particular provision, however, is sparse.

The primary purpose of § 29 remains unchanged. Section 29 is still directed to the goal of preventing national banks from accumulating large amounts of real estate. However, the 1980 and 1982 amendments reflect Congress' intent to provide banks some relief from the rigidity of the original absolute five-year limitation.

SECTION 10-06-13, N.D.C.C.

Section 10-06-01, N.D.C.C., provides that "[a]ll corporations, except as otherwise provided in this chapter, are prohibited from owning or leasing land used for farming or ranching and from engaging in the business of farming or ranching." Certain exemptions from this prohibition are set forth in § 10-06-13, N.D.C.C.

"10-06-13. Enforcement.

* * * * *

"4. Subject to the divestiture requirements of subsections 5, 6, and 7, a domestic or foreign corporation may acquire farmland or ranchland as security for indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise.

"5. Unless retention of the farmland or ranchland is permitted under subsection 6 or 7, all farmland or ranchland acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter.

"6. The disposition requirement does not apply to a corporation that has acquired title to the land through the process of foreclosure of a mortgage, or a deed from a mortgagor instead of a foreclosure, if, by the expiration of one month after what is or what would have been if the mortgage had been foreclosed the redemption period of the mortgage, that corporation leases to the prior mortgagor from whom it was acquired, with an option to purchase, and if documents evidencing the lease agreement have been filed with the register of deeds of each county in which the land is located. A copy of a notice of lease is sufficient evidence. The exemption in this subsection applies for only five years and then only if the property has been appraised in accordance with subsection 8. The annual lease payments required of the tenant

cannot exceed seven percent of the appraised value.

"7. The disposition requirement does not apply to a corporation that has acquired title to the land through the process of foreclosure of a mortgage, or a deed from the mortgagor instead of foreclosure, if, by the expiration of one month after what is or what would have been if the mortgage had been foreclosed the redemption period of the mortgage, that corporation contracts for the sale of the land to the prior mortgagor from whom it was acquired, and if documents evidencing the purchase agreement have been filed with the register of deeds of each county in which the land is located. A copy of a notice of the contract for deed is sufficient evidence. An exemption under this subsection is valid only if an appraisal has been made in accordance with subsection 8, and if it is valid, the exemption is unlimited in duration. The sale price cannot exceed the price determined by the appraisers."

In 1932 North Dakota voters approved an initiated measure which became known as North Dakota's anti-corporate farming law. *See* Note, *An Analysis of House Bill 782: The Latest Attempt to Repeal North Dakota's Ban on Corporate Farming,* 44 N.D.L.Rev. 255, 256 (1968). That initiated measure is currently found in amended form in Chapter 10-06, N.D.C.C. *See State v. J. P. Lamb Land Company,* 401 N.W.2d 713, 715 (N.D. 1987). When the law was originally adopted, "North Dakota was at the bottom of the great depression" and the "Act was aimed in large measure at life insurance companies and out-[of]-state corporate lenders which had foreclosed on thousands of acres of North Dakota agricultural land." McElroy, *North Dakota's Anti-Corporate Farming Act,* 36

N.D.L.Rev. 96 (1960). *See also* Note, *supra,* 44 N.D.L.Rev. at 256-257.

Numerous efforts to alter the prohibition against corporate farming finally succeeded in 1981. *See* 1981 N.D.Sess.Laws Ch. 134;; Note, *North Dakota's Corporate Farming Statute: An Analysis of the Recent Change in the Law,* 58 N.D.L.Rev. 283, 286-287 (1982). The three-year divestiture period for creditor corporations was part of this legislation. The statute required that "[a]ll farm or ranch land acquired as security for indebtedness . . . be disposed of within three years after acquiring ownership . . .," and, like the original 1864 federal legislation, did not provide any exceptions for extending the divestiture period. 1981 N.D.Sess.Laws Ch. 134, § 10. While the legislative history concerning this particular facet of the legislation is meager, we agree with the observation that the intent, as well as the "practical effect of the 1981 restrictions on creditor corporations is to protect their legitimate business interests while preventing the accumulation of farm and ranch land by such corporations." Note, *supra,* 58 N.D.L.Rev. at 292 (footnote omitted). Thus, the purposes and goals underlying the original 1981 state three-year divestiture period are identical to those underlying the original 1864 federal five-year divestiture period.

The extension periods for divestiture under state law were enacted by the Legislature in 1985. *See* 1985 N.D.Sess.Laws Ch. 146, § 1. A five-year extension beyond the initial three-year period is allowed to a creditor corporation if the corporation leases with an option to purchase to the mortgagor from whom the land was acquired. *See* § 10-06-13(6), N.D.C.C. The extension period is unlimited in duration if the creditor corporation contracts for the sale of the land to the prior mortgagor. *See* § 10-06-13(7), N.D.C.C. The legislative history reveals that the purpose of this legislation was to encourage lenders to work out problems and negotiate with mortgagors. *See* Minutes of the House Agriculture Committee, H.B. 1636, February

7, 1985; Minutes of the Senate Agriculture Committee, H.B. 1636, February 28, 1985, March 8, 1985, March 15, 1985, and March 26, 1985. It was further believed that by encouraging lenders to work out repayment arrangements with the borrower, land would be kept off the market, thereby halting the decline in farm real estate values, so that lenders, as well as borrowers, would benefit. Minutes of the Senate Agriculture Committee, H.B. 1636, February 28, 1985, and March 26, 1985 (statements of Rep. R. Meyer).

Thus, the primary purpose of the three-year divestiture period under state law, like the primary purpose of the five-year divestiture period under § 29, is to prevent the accumulation of farmland and ranchland by corporations. Furthermore, the State Legislature, like Congress, has attempted, through recent amendments, to alleviate the rigidity of the three-year period by providing for extensions under certain circumstances.

ANALYSIS

Counsel have cited numerous cases in support of their respective positions. The cases cited are not particularly helpful, other than for statements of general pre-emption principles, because none addresses the specific issue we face here. Perhaps *Omaha Nat'l Bank v. Spire*, 223 Neb. 209, 234, 389 N.W.2d 269, 284 (1986), comes closest, but there the court declined to decide whether that state's five-year limitation on the holding of farm and ranch lands, without exception, was pre-empted by 12 U.S.C. § 29 because the question was "too theoretical to determine in a declaratory judgment action at this time." We have been unable to find any decision addressing the precise issue before us.

We are not convinced that there is an "actual conflict" for pre-emption purposes between 12 U.S.C. § 29 and § 10-06-13, N.D.C.C. A state law is not invalid under the

Supremacy Clause merely because it differs from a federal law. *See generally CTS Corp. v. Dynamics Corp. of America*, ___U.S. ___, ___, *107 S.Ct. 1637, 1645-1648, 95 L.Ed.2d 67 (1987)*; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); *Pinney Dock and Transport Co. v. Penn. Cent. Corp.*, 838 F.2d 1445, 1480-1482 (6th Cir. 1988); *Rousseff v. Dean Witter & Co., Inc.*, 453 F.Supp. 774, 780-782 N.D.Ind. 1978); L. Tribe, *American Constitutional Law* § 6-26, at p. 491 (2d ed. 1988); *but compare Transamerica Ins. Co. v. Standard Oil Co.*, 325 N.W.2d 210, 213 (N.D. 1982). Rather, the inquiry is whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. As we have noted, the primary purpose of each law is the same, *i.e.*, preventing banks and corporations from becoming monopolistic holders of real estate. So too, there is a similar congruity of the secondary goals, *i.e.*, providing a measure of protection to banks and corporations through the respective legislative bodies' reasonable choices of appropriate divestiture periods. Thus, the state law is not repugnant to the purposes and objectives of the federal law. By incorporating the federal proscription against banks holding real estate "in mortmain," state law, in fact, enhances the primary purpose of the federal statute. *See Rousseff v. Dean Witter & Co., Inc., supra*, 453 F.Supp. at 781; *cf. CTS Corp. v. Dynamics Corp. of America, supra.* "[W]here . . . the state law enhances the primary and overall purpose of the federal law, it is not invalid under the Supremacy Clause." *Rousseff v. Dean Witter & Co., Inc., supra*, 453 F.Supp. at 782.

Nor do we believe that § 10-06-13 operates to frustrate Congress' objectives in enacting the recent "housekeeping" amendments to § 29 allowing the Comptroller of the Currency to extend the holding period an additional five years if a good faith attempt has been made to dispose of the property or if it appears disposal would be detrimental to

the bank. The State Legislature, like Congress, has eased the rigidity of the three-year limitation by allowing exemptions. While the exemptions under state law are more narrowly drawn than those allowed by § 29, the Legislature could reasonably determine that the exemptions will provide adequate protection for the banks, and we believe that the state statute as a whole does no violence to the purpose and objectives of the federal statute. We conclude that § 10-06-13, N.D.C.C., is not pre-empted by 12 U.S.C. § 29. Accordingly, the district court erred in determining that the state three-year divestiture requirement was not applicable to Liberty National.

Liberty National contends that if § 10-06-13 is not pre-empted by § 29, state-chartered banks would have a competitive advantage over national banks because state banks are allowed to hold real estate for at least five years under lst 6-03-09, N.D.C.C. *See generally First National Bank v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), and 7 *Michie on Banks and Banking*, Ch. 15, § 154 (1980), discussing the concept of "competitive equality" in banking activities. We disagree with Liberty National's assertion.

Section 6-03-09, N.D.C.C., provides:

> "*6-03-09. Holding of real estate -- Limitation.* No banking association may hold the possession of any real estate under mortgage, nor title and possession of any real estate purchased to satisfy indebtedness, for a longer period than five years from the date of acquiring title thereto unless such time has been extended by certificate of the commissioner."

National banks are specifically excluded from the definition of a "banking association" for purposes of Title 6. *See* § 6-01-02(1), N.D.C.C.

On their face, both the three-year divestiture period under § 10-06-13 and the five-year divestiture period under

§ 6-03-09 would appear to apply to a state bank's holding of farmland or ranchland. Because of this irreconcilable conflict between the two statutes, Liberty National contends that pursuant to § 1-02-07, N.D.C.C., the special provision, *i.e.*, § 6-03-09, prevails over the general provision, *i.e.*, § 10-06-13. However, we do not believe § 1-02-07, N.D.C.C., helps to resolve this statutory conflict.

The three-year divestiture period under the corporate farming laws is a general provision in the sense that it applies to all "corporations," but it is also a special provision insofar as it applies to divestiture of only "farmland or ranchland." § 10-06-13(5), N.D.C.C. Likewise, § 6-03-09 is a special provision in the sense that it applies to only state "banking associations," but it is also a general provision because it applies to divestiture of "any real estate." We have held that § 1-02-07, N.D.C.C., is inapplicable where the statutory provisions under consideration "are all special and consequently are of the same stature." *Northwestern Savings & Loan Ass'n v. Baumgartner,* 136 N.W.2d 640, 643 (N.D. 1965). We believe § 1-02-07 is equally inapplicable where both provisions are general in nature, or where, as here, the provisions under consideration have both conflicting general and special features. Thus rendering it impossible to determine which provision the Legislature intended to prevail. Under these circumstances, "the subsequent act must prevail." 2A Sands, *Sutherland Statutory Construction,* § 51.03, at p. 469 (4th ed. 1984). *Cf. Northwestern Savings & Loan Ass'n v. Baumgartner, supra;* § 1-02-08, N.D.C.C. Because § 10-06-13 is the more recent enactment, we conclude that state banks are subject to the three-year divestiture period with regard to farmland or ranchland. Thus, national banks are not placed at a competitive disadvantage by their being subject to the three-year divestiture requirement.

Accordingly, the district court summary judgment dismissing the State's complaint is reversed.

Beryl J. Levine
Vernon R. Pederson S.J.
Herbert L. Meschke
H.F. Gierke, III
Ralph J. Erickstad,
Chief Justice

PEDERSON, S. J., sitting in place of VandeWalle, J., disqualified.

STATE OF NORTH DAKOTA	**IN DISTRICT COURT**
COUNTY OF SLOPE	**SOUTHWEST JUDICIAL DISTRICT**
State of North Dakota, Plaintiff, vs Liberty National Bank and Trust Company, a North Dakota Corporation, Defendant,	ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

It appearing to the Court that on the 27th day of July, 1987, hearing was held before this Court upon the Plaintiff's Motion for Summary Judgment as prepared and filed by legal counsel for the Plaintiff, Assistant Attorney General Allen C. Hoberg, Bismarck, N. D., and further that hearing was held upon the Defendant's resistance to said Motion for Summary Judgment by the Plaintiff and the Defendant's independent Motion for Summary Judgment as offered by the Defendant by and through its legal counsel, Attorney Gordon Schnell, Dickinson, N. D.

The Court having considered said oral arguments, together the Briefs of the respective parties and all pleadings of record, does herewith find and determine the following:

UNDISPUTED FACTS

I

That the Defendant herein is a National Bank operating pursuant to a national charter and subject to supervision by the Office of the Comptroller of Currency, United States Government.

That in 1982 and years prior thereto, the Defendant did loan substantial sums of money to one Marvin D. Lutz,

with said loans evidenced by a promissory note dated April 13, 1982, in the principal sum of $151,421.16, and as secured in part by a real estate mortgage to the Defendant upon 320 acres of farm land located in Slope County, N. D., and as described as follows:

The Southwest quarter of the Northwest quarter;
The West half of the Southwest quarter;
The Southeast quarter of the Southwest quarter;
The North half of the North half all in Section 26, Township 134 North, Range 98 West.

III

That in 1983, the said Marvin D. Lutz did default upon said promissory note, and in an effort to avoid foreclosure upon said real estate mortgage, did convey the foregoing described real property to the Defendant herein by Warranty Deed dated September 19, 1983, and that said real property has remained the property of the Defendant from and after the date of conveyance.

IV

That from and after the date of conveyance of said real property to the Defendant herein, said real property has been leased by the Defendant to Farmer/Operators of said real property, and that the same is devoted to agricultural endeavors.

V

That as a result of the foregoing loan by the Defendant to Marvin Lutz, and the subsequent conveyance of said real property from Marvin Lutz to the Defendant in satisfaction of said loan, the Defendant herein did suffer a loss of $44,221.16, as a result of the declining values in real property.

VI

That the Defendant herein has in good faith actively attempted to sell said real property by seeking private bids thereon and by listing the same for sale with a local realtor, but that to the date hereof the highest offer received by the Defendant for purchase of said real property is in the amount of $64,000.00.

VII

That the action brought by the Plaintiff as against the Defendant is pursuant to North Dakota Century Code Section 10-06-13, and seeks to compel the Defendant to comply with the Corporate Farming law of the State of North Dakota or to divest itself of all farm land or ranch land it owns within the State of North Dakota, meaning the foregoing described real property.

VIII

That the Defendant herein has held title to the foregoing described real property for a period exceeding three years.

IX

That the Defendant does not qualify for any express exemptions as set forth in Chapter 10-06 of the North Dakota Century Code.

OPINION

The Plaintiff in prosecuting the above entitled litigation pursuant to the provisions of Chapter 10-06 of the North Dakota Century Code, argues to the Court that the Defendant is a corporation as defined in Chapter 10-06 of the North Dakota Century Code, that there is no exception contained therein which is applicable to said Defendant, and accordingly that the Defendant is bound by the pro-

visions of Section 10-06-13, (2) (4), which provide as follows:

> "2. The divestment period is deemed to be a convenant running with the Title to the land against any corporate grantee, corporate successor, or corporation assignee of the corporation not authorized to do business under this chapter."
>
> "4. Subject to the divestiture requirements of subsections 5, 6 and 7, a domestic or foreign corporation may acquire farm land or ranch land as security to indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon whether created by mortgage or otherwise"
>
> "5. Unless retention of the farm land or ranch land is permitted under subsection 6 or 7, all farm land or ranch land acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter."

It is conceded by the Defendant herein that the Defendant does not qualify for the exceptions as set forth in subsections 6 and 7 of Section 10-06-13 of the North Dakota Century Code.

The issue presented before the Court is whether or not the Defendant is subject to the provisions of Chapter 10-06 of the North Dakota Century Code, or has said statutes and its application to the Defendant been preempted by 12 USC Section 29. 12 USC Section 29 clearly provides for the supervision of National Banks by the Office of the Comptroller of Currency, and does expressly provide that National Banks may retain ownership of real property for a period of five years, and may in fact apply to the Comp-

troller of Currency for an extension of time for an additional five year period, therein making a permissible time period of ten years for disposition of real property.

If the Defendant is subject to the provisions of Section 10-05-13 (5) of the North Dakota Century Code, the Defendant would then be compelled to dispose of all real property interests within three years from the date of acquisition of title to the same.

The Plaintiff herein argues that there has been no preemption by the United States Government in the enactment of 12 USC Section 29, in that compliance with said section may occur simultaneously with compliance with Section 10-06-13 subparagraph 5 of the North Dakota Century Code. In otherwords if indeed the Defendant had disposed of said real property within thirty-six months from the date of acquisition of title to the same, the Defendant may have complied with the North Dakota Century Code and the United States Code as applicable. The Plaintiff then continues to argue that since impossibility of compliance does not exist, that there is no conflict between such statutes and accordingly there is no basis to argue preemption by the United States Government.

The Defendant herein argues that there is a fundamental conflict between the provisions of the United States Code and the North Dakota Century Code in that compelling the Defendant to comply with the provisions of the North Dakota Century Code expressly deny to the Defendant the flexibility provided the Defendant by 12 USC Section 29. Accordingly, the Defendant argues that this fundamental conflict impairs the flexibility assured to the Defendant by 12 USC 29, and accordingly that there is a fundamental conflict, and therefore preemption by the United States Government.

This Court finds the decision in *Fidelity Federal Savings and Loan Association v de la Cuesta,* 458 U. S. 140 to be persuasive authority that there does indeed exist in the

case at bar a fundamental conflict between Chapter 10-06 of the North Dakota Century Code and 12 USC Section 29. Therein the United States Supreme Court recognized that the relative importance to the State of its own law is not material when there is a conflict with a valid Federal law. The United States Government by granting to banks with national charters the opportunity to dispose of real property acquired in the ordinary course of their business, has expressly granted to such national banks flexibility within their internal operations and accordingly to suggest that an reduction of that period of time by state statute is not a conflict, is without merit.

It is therefore the Opinion of this Court that there is a fundamental conflict between the provisions of North Dakota Century Code 10-06 and its application to the Defendant herein in the disposition of real property, and the provisions of 12 USC Section 29. It follows therefrom that having determined that a fundamental conflict does exist, that the United States Government has preempted the particular area of retention of real property interests by a nationally chartered bank, and accordingly that the State of North Dakota may not enact legislation which would directly conflict with the provisions of 12 USC Section 29.

It is therefore the decision of this Court that the Defendant herein is entitled to Summary Judgment pursuant to Rule 56 of the North Dakota Rules of Civil Procedure, in that there is no material factual issue existing between the parties hereto, and that the Defendant herein is entitled to Judgment as a matter of law. It is therefore the Order of the Court that legal counsel for the Defendant shall prepare a Judgment of Dismissal in the foregoing litigation, and shall be entitled to statutory costs and allowances.

It is the further Order of the Court that the Defendant's Motion for Attorneys fees as a result of the foregoing litigation is herewith denied.

Dated at Hettinger, N. D. this 3rd day of August, 1987.

BY THE COURT:
/s/ DONALD L. JORGENSEN
DONALD L. JORGENSEN
DISTRICT JUDGE

STATE OF NORTH DAKOTA COUNTY OF SLOPE	IN DISTRICT COURT SOUTHWEST JUDICIAL DISTRICT
State of North Dakota, Plaintiff, -vs- Liberty National Bank and Trust Company, a North Dakota Corporation, Defendant.	NOTICE OF APPEAL Civil No. 1-87

TO: LIBERTY NATIONAL BANK AND TRUST COMPANY and MR. DUANE ANDERSON, ITS PRESIDENT, 115 FIRST AVENUE WEST, DICKINSON, NORTH DAKOTA 58601, and ITS ATTORNEY, GORDON W. SCHNELL, MACKOFF, KELLOGG, KIRBY & KLOSTER, P.C., 46 WEST SECOND STREET, POST OFFICE BOX 1097, DICKINSON, NORTH DAKOTA 58602-1097

PLEASE TAKE NOTICE that the State of North Dakota, in the above-titled action does hereby appeal to the Supreme Court of the State of North Dakota from that judgment of the district court entered in this action on the 24th day of August, 1987.

Dated at Bismarck, North Dakota, this 31st day of August, 1987.

State of North Dakota
Nicholas J. Spaeth
Attorney General
BY: /s/Allen C. Hoberg
Allen C. Hoberg
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarck, North Dakota 58505

Attorneys for the Plaintiff,
State of North Dakota

STATE OF NORTH DAKOTA COUNTY OF SLOPE		IN DISTRICT COURT SOUTHWEST JUDICIAL DISTRICT
State of North Dakota, Plaintiffs, -vs- Liberty National Bank and Trust Company, a North Dakota Corporation, Defendant.	)	Civil No.____ COMPLAINT

Plaintiff, State of North Dakota, for its Complaint against defendant, Liberty National Bank and Trust Company, Dickinson, North Dakota, states and alleges as follows:

I.

Defendant, Liberty National Bank and Trust Company, is a corporation, chartered by the Comptroller of the Currency under authority from the National Bank Act of 1864, 12 U.S.C. 51 *et seq.* 21, 22, 26, and 27, and the Federal Deposit Insurance Act of 1935, 12 U.S.C. §§1814(b) and 1816. It is authorized to do business in the State of North Dakota as a national bank and trust company under the laws of the United States and pursuant to the Comptroller's approval.

II.

Defendant is the owner of a tract of farmland or ranchland located in Slope County, North Dakota, more particularly described as follows:

Twp. 134 N., Rge. 98 W., Sec/ 26: $SW^1/_4NW^1/_4$; $W^1/_2SW^1/_4$; $SE^1/_4SW^1/_4$ and $N^1/_2N^1/_2$, Slope County, North Dakota (320 acres more or less).

III.

The above-described real property is farmland or ranchland within the meaning of N.D.C.C. Ch. 10-06.

IV.

The defendant, Liberty National Bank and Trust Company, was incorporated as a national bank and trust company when it acquired the above-described real property.

V.

Defendant is not a family farm corporation organized pursuant to N.D.C.C. Ch. 10-06, nor a nonprofit organization authorized to hold land pursuant to N.D.C.C. Ch. 10-06. Neither is the defendant owning or leasing farmland or ranchland pursuant to an exception identified in N.D.C.C. Ch. 10-06. It, therefore, is not lawfully owning or leasing farmland or ranchland or engaging in farming or ranching in North Dakota pursuant to N.D.C.C. Ch. 10-06.

VI.

This action is brought pursuant to N.D.C.C. §10-06-13, to force the defendant to comply with the corporate farming law of the State of North Dakota or to divest itself

of all farmland or ranchland it owns within the State of North Dakota.

VII.

North Dakota's anti-corporate farming law originated through an initiated measure approved by the voters on June 29, 1932. Since that date this law has been amended on several occasions, the most recent was during the 1985 Legislative Assembly.

VIII.

N.D.C.C. §10-06-13 allows domestic or foreign corporations to "acquire farmland or ranchland as security for indebtedness, by process of law in the collection debts or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise." This section so requires that "unless retention of the farmland or ranchland is permitted under subsection 6 or 7, all farmland or ranchland acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter."

IX.

Liberty National Bank and Trust Company acquired ownership of the aforementioned tract of land in Slope County on September 19, 1983, by warranty deed from Marvin D. Lutz and Stella M. Lutz, husband and wife, grantors. Such ownership was acquired within the meaning of N.D.C.C. §10-06-13 "as security for indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of the lien or claim thereon, whether created by mortgage or otherwise." Such land has been held longer than the three-year statutory period

and retention of such land is not otherwise in accord with the exceptions of N.D.C.C. §10-06-13.

X.

Defendant's ownership and use of the land set forth above is, therefore, in violation of N.D.C.C. Ch. 10-06.

WHEREFORE, plaintiff prays:

1. That the Court issue its order declaring defendant in violation of N.D.C.C. Ch. 10-06;

2. That the Court, after the Attorney General has filed said order in Slope County Court, order defendant to divest itself of all farmland or ranchland which it owns, pursuant to N.D.C.C. §10-06-13(1).

3. That if the defendant fails to comply with Court's order pursuant to N.D.C.C. §10-06-13(1), the Court order the defendant to be dissolved by the Secretary of State or to cease doing business in North Dakota, or take such other and further action as may be fair, just, and equitable.

DATED this 9th day of February, 1987.

State of North Dakota
Nicholas J. Spaeth
Attorney General

By: /s/Allen C. Hoberg
Allen C. Hoberg
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarck, ND 58505

Attorneys for Plaintiff

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF SLOPE	SOUTHWEST JUDICIAL DISTRICT
State of North Dakota, Plaintiff, -vs- Liberty National Bank and Trust Company, a North Dakota corporation, Defendant.	ANSWER Civil No. ____

COMES NOW the Defendant, Liberty National Bank and Trust Company ("Liberty"), by and through its attorneys, Mackoff, Kellogg, Kirby & Kloster, P.C., and for its Answer to the Plaintiffs' Complaint in the above action, states and alleges as follows:

GENERAL DENIAL

I.

Liberty denies each and every allegation and thing contained in the Complaint of Plaintiff, State of North Dakota, except as hereinafter specifically admitted, qualified, modified, or explained.

RESPONSE TO PLAINTIFF'S CLAIM FOR RELIEF

II.

Liberty admits the allegations contained in Paragraphs I, II, III, and IV of the Plaintiff's Complaint, except that with respect to Paragraphs I and IV thereof Liberty alleges that it is a national banking association rather than a corporation.

III.

With respect to the allegations contained in Paragraph V of the Plaintiff's Complaint, Liberty admits that it is not a family farm corporation organized pursuant to N.D.C.C. Ch. 10-06, nor a non-profit organization authorized to hold land pursuant to N.D.C.C. Ch. 10-06 and Liberty admits that it is not owning or leasing farmland or ranchland pursuant to an exception identified in N.D.C.C. Ch. 10-06. With respect to the allegations in said Paragraph concerning lawfully owning or leasing farmland or ranchland, Liberty admits that it is not doing so pursuant to N.D.C.C. Ch. 10-06, but alleges that Ch. 10-06 is not applicable to Liberty, as hereinafter set forth.

IV.

Liberty admits the allegations of Paragraphs VI and VII of the Plaintiff's Complaint.

V.

Liberty admits the allegations contained in Paragraph VIII of the Plaintiff's Complaint, but specifically denies that N.D.C.C. Ch. 10-06 is applicable to Liberty, as hereinafter set forth.

VI.

Liberty admits the allegations of Paragraph IX of the Plaintiff's Complaint, but specifically denies that the three-year statutory period set forth in N.D.C.C. §10-06-13 is applicable to Liberty, as hereinafter set forth.

VII.

Liberty admits the allegations of Paragraph X of the Plaintiff's Complaint, but alleges that N.D.C.C. Ch. 10-06 is not applicable to Liberty, as hereinafter set forth.

AFFIRMATIVE DEFENSES

VIII.

That N.D.C.C. Ch. 10-06 does not apply and was not meant to apply to national banking associations such as Liberty.

IX.

That N.D.C.C. Ch. 10-06 is pre-empted and is inapplicable to Liberty by virtue of 12 U.S.C. §29 (Supp. 1986).

X.

That N.D.C.C. Ch. 10-06 is inapplicable to North Dakota banks by virtue of N.D.C.C. §6-03-09.

XI.

The Complaint fails to state a claim upon which relief can be granted.

XII.

The Plaintiff knows or should know that North Dakota's corporate farming law is pre-empted with respect to banks by federal law, and therefore, the Plaintiff's claim is frivolous in nature and without merit, and consequently Liberty is entitled to its costs and attorney's fees in defense of this action pursuant to §28-26-01(2) and §28-26-31, N.D.C.C.

WHEREFORE, Defendant, Liberty, prays for judgment and relief as follows:

1. that the Plaintiff's Complaint and all things therein be dismissed with prejudice and on the merits;

2. for costs, disbursements, and reasonable attorney's fees pursuant to §28-26-01(2) and §28-26-31, N.D.C.C.; and

3. for such other equitable and further relief as to the Court seems just and equitable.

Dated this 18th day of March, 1987.

MACKOFF, KELLOGG, KIRBY & KLOSTER, P.C.
Attorneys for the Defendant
Office and Post Office Address:
46 West Second Street, P. O. Box 1097
Dickinson, North Dakota 58602-1097

By: Gordon W. Schnell
Gordon W. Schnell, Attorney

CERTIFICATE OF SERVICE

I hereby certify that I caused for a true and correct copy of the foregoing ANSWER to be mailed, by first class mail with postage duly prepaid, on the 18th day of March, 1987, to the following person:

Allen Hoberg
Assistant Attorney General
State of North Dakota
State Capitol
Bismarck, North Dakota 58505

Gordon W. Schnell, Attorney

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF SLOPE	SOUTHWEST JUDICIAL DISTRICT
State of North Dakota, Plaintiff, -vs- Liberty National Bank and Trust Company, a North Dakota corporation, Defendant.	Civil No. 1-87 MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

TO: THE HONORABLE DONALD L. JORGENSEN, JUDGE OF THE SLOPE COUNTY DISTRICT COURT:

The plaintiff, State of North Dakota, in the above-titled action, by and through its Attorney General, Nicholas J. Spaeth, and his Assistant Attorney General, Allen C. Hoberg, does hereby move this court for a Motion for Judgment on the Pleadings or for Summary Judgment in its favor on the grounds that there are no genuine issues as to any material fact based on the pleadings of the parties and that plaintiff is entitled to judgment as a matter of law. Further, the plaintiff moves for a judgment in its favor on the grounds that the defendant is in violation of N.D.C.C. Ch. 10-06. The defendant is a corporation within the meaning of N.D.C.C. Ch. 10-06. N.D.C.C. Ch. 10-06, and specifically N.D.C.C. §10-06-13, is applicable to the defendant and is meant to apply to national banking associations.

The plaintiff submits this Motion pursuant to Rule 12(c) and Rule 56 of the North Dakota Rules of Civil Procedure

and Rule 3.2(c) of the North Dakota Rules of Court. The plaintiff does not request the taking of testimony or the taking of oral argument so no hearing date has been set.

This Motion is based upon plaintiff's Brief in Support of the Motion for Judgment on the Pleadings or Summary Judgment, and in all other pleadings, papers, and records on file in this action.

Dated at Bismarck, North Dakota, this 11th day of May, 1987.

State of North Dakota
Nicholas J. Spaeth
Attorney General

By: /s/Allen C. Hoberg
Allen C. Hobert
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarck, ND 58505

Attorneys for the Plaintiff

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF SLOPE	SOUTHWEST JUDICIAL DISTRICT
State of North Dakota, Plaintiff, -vs- Liberty National Bank and Trust Company, a North Dakota corporation, Defendant.	DEFENDANT'S RETURN AND MOTION FOR SUMMARY JUDGMENT Civil No. 1-87

The Defendant, Liberty National Bank and Trust Company, by and through its Attorneys, does hereby resist the Plaintiff's Motion for Judgment on the Pleadings or for Summary Judgment herein, upon the grounds that the three year limit specified in subsection 5 of Section 10-06-13 NDCC is preempted by the five year provision contained in 12 USC §29, and that by virtue thereof and the other reasons set forth in the Answer herein, the Plaintiff's Complaint fails to state a claim upon which relief can be granted.

The Defendant does further move the Court for Summary Judgment in its favor dismissing the Plaintiff's claim in this action pursuant to Rule 56(b) of the North Dakota Rules of Civil Procedure, upon the grounds that there is no genuine issue as to any material fact, and that the Defendant Liberty National Bank and Trust Company is entitled to judgment dismissing the Plaintiff's claim as a matter of law.

This Motion and Return are based upon all of the pleadings, records, and files herein, and upon the Affidavits of Duane Anderson and Arthur Gatzke filed herewith; to-

gether with the Defendant's Brief in support hereof and the letter brief from the Chief Counsel of the United States Comptroller of the Currency submitted herewith.

The Defendant further prays that it be awarded its costs and disbursements herein, including Motion costs.

The Defendant requests that oral arguments be held.

Dated this 12th day of June, 1987.

MACKOFF, KELLOGG, KIRBY &
KLOSTER, P.C.
By: Gordon W. Schnell and Mary E. Maichel
Attorneys for the Defendant
Office and Post Office Address:
46 West Second Street, P.O. Box 1097
Dickinson, North Dakota 58602-1097

By: /s/Gordon W. Schnell, Attorney

By: /s/Mary E. Maichel,
Mary E. Maichel, Attorney

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 870256

State of North Dakota, Plaintiff and Appellant

v.

Liberty National Bank and Trust Company, a North Dakota Corporation, Defendant and Appellee

The original and seven copies of a Motion to Extend Stay of Mandate were filed August 15, 1988, in the above-entitled case.

ORDERED, that an extension of the Stay of Mandate is granted to September 26, 1988, under the provisions of Rule 41(b) of the North Dakota Rules of Appellate Procedure.

The Supreme Court of the State of North Dakota convened at 1:30 p.m. this 16th day of August, 1988, with the Chief Justice, the Honorable Ralph J. Erickstad, acting as Administrative Justice pursuant to the provisions of Administrative Rule 11, and the Deputy Clerk of the Supreme Court, Penny Barry, being present and directed the entry of the above order.

/s/Penny Barry
Penny Barry
Deputy Clerk
North Dakota Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

File No. 870256

Appeal from the District Court of Slope County.

State of North Dakota,
Plaintiff and Appellant

v.

Liberty National Bank and
Trust Company, a North Dakota Corporation,
Defendant and Appellee

This appeal having been heard by the Court at the January, 1988, term before:

The Honorable Ralph J. Erickstad, Chief Justice; the Honorable H.F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Beryl J. Levine, the Honorable Vernon R. Pederson, Surrogate Judge, Justices;

and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the summary judgment of the court below be and the same is hereby REVERSED.

It is further ordered and adjudged that Appellant have and recover from Appellee costs and disbursements on this appeal, to be taxed and allowed in the court below.

Dated: June 28, 1988.

By the Court:

/s/ Ralph J. Erickstad
Chief Justice
North Dakota Supreme Court

Attest: /s/ Luella Dunn
Clerk of the Supreme Court

Seal

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 870256

State of North Dakota,
Plaintiff and Appellant

v.

Liberty National Bank and
Trust Company, a North Dakota Corporation,
Defendant and Appellee

The original and seven copies of a Motion to Stay Mandate were filed July 18, 1988, in the above-entitled case.

ORDERED, that a 30-day Stay of Mandate is granted under the provisions of Rule 41(b) of the North Dakota Rules of Appellate Procedure.

Entered this 18th day of July, 1988, under the provisions of Administrative Rule 5.

/s/ Luella Dunn
Luella Dunn
Clerk
North Dakota Supreme Court